THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 131 of 2018
CV 2015 - 04129

BETWEEN

CINDY RAMPERSADSINGH
SHERRY-ANN RAMPERSADSINGH

CLAIMANTS

AND

ONYX INVESTMENTS LIMITED
(by original action)

DEFENDANT

AND BETWEEN

ONYX INVESTMENTS LIMITED

ANCILLIARY CLAIMANT/APPELLANT

AND

FITZWILLIAM, STONE, FURNESS-SMITH & MORGAN
(A Partnership and/or Firm registered under the laws of Trinidad and Tobago and issued pursuant to Section 12 of the Partnership Act Chapter 81:02 and in accordance with Part 22.1 of the Civil Proceedings' Rules 1998, as amended)

1st ANCILLARY DEFENDANT/1st RESPONDENT

DAVID YUNG
Sued in his individual capacity

2nd ANCILLARY DEFENDANT/2nd RESPONDENT

TERRA CARIBBEAN (Trinidad) Limited

3rd ANCILLARY DEFENDANT/3rd RESPONDENT

MILTON STEEL
4th ANCILLARY DEFENDANT/ 4th RESPONDENT

PANEL: **Jones, J.A.**
Rajkumar, J.A.
des Vignes, J.A.

APPEARANCES: Mr. Rambally instructed by Ms. Sankar for the Appellant
Mr. Martineau S.C. and Mr. Garcia instructed by Ms. H. White holding for Ms. Flemming for the first and second Respondents
Mr. Singh instructed by Ms. Rojas for the third Respondent

DATE OF DELIVERY: 21st June 2019

I have read the judgment of Jones J.A. and I agree.

Rajkumar JA
Justice of Appeal

I too agree.

des Vignes JA
Justice of Appeal

Judgment

1. The sole issue for determination on this appeal is whether the ancillary claim in negligence brought by the Appellant, Onyx Investments Limited, (Onyx) against the Respondents, David Yung, (Yung), Fitzwilliam Stone Furness-Smith and Morgan (Fitzstone) and Terra Caribbean (Trinidad) Limited (Terra) is statute barred. The appeal concerns the sale of a parcel of land in which Terra acted for Onyx as its real estate agent and Yung, an attorney at Law and a partner in Fitzstone a firm of Attorneys, acted as the Attorney at Law for Onyx.

2. By the ancillary claim Onyx sought an indemnity against the Respondents for any orders made against it in the claim brought by the claimants in the original action, the Rampersadsinghs, against it on the basis of the Respondents' breach of contract and negligence. Before the Judge it was agreed that the issue of whether the ancillary claim was statute- barred be dealt with as a preliminary issue. It is the Judge's ruling that the claim against the Respondents is statute barred that is the subject of this appeal. Onyx does not dispute that the claim in contract is statute-barred. Its challenge before us is only to the finding of the Judge with respect to the claim in negligence.

3. The facts are straightforward. In December 2015 the Rampersadsinghs brought an action against Onyx, seeking a declaration that they were the owners of a parcel of land situate in Valsayn. By the claim they alleged that the deed of conveyance purporting to transfer the land to Onyx was fraudulent. They allege that they never sold the land to Onyx and that the signatures on the deed of conveyance purporting to belong to them were forgeries. The deed of conveyance was executed on 7 September 2009 and purported to convey the freehold title to the land to Onyx for the sum of $3,300,000.00.

4. Onyx defended the claim and, by way of ancillary claim filed on 25 May 2016, sought an indemnity from the Respondents on the basis of the Respondents' breach of contract and negligence. The allegations against each of the Respondents are that their actions or omissions caused Onyx to enter into a deed of conveyance by which it paid the purchase price for the freehold title in the land. By way of separate defences the Respondents deny the allegations of negligence. They also plead that the ancillary claim was statute barred having been brought after the expiry of four years from the date on which the cause of action arose.

5. For the purposes of the preliminary point the arguments proceeded on the basis that the allegations made by Onyx against the Respondents in the ancillary claim were undisputed. **Section 3(1)(a) of the Limitation of Certain Actions Act Chap 7:09** (the Act) provides that the time for bringing an action in tort is four years from the date on which the cause of action accrued. It was common ground before the Judge that the cause of action in negligence accrued at the time when Onyx first suffered loss. The Judge determined that the case raised on the claim was one of forgery and, if proved, the deed would be void ab initio. He concluded that from the time Onyx executed the deed and paid the purchase price it suffered loss "as monies were paid and it expected to receive something which it did not."

6. By way of an alternative argument Onyx submitted that section 4(1) and not section 3(1) of the Act applied to the case. The Judge rejected that submission. According to the Judge section 4(1) dealt with a situation "where two persons have caused damage to a Claimant arising out of the same tort, not a situation where a tortfeasor is claiming that a person who has not contributed to the damage suffered by the Claimant is liable to indemnify the tortfeasor for any loss he has suffered arising out of the claim against him by the Claimant".

7. Before us Onyx repeats both submissions made before the Judge. In addition it submits that the Act does not apply to the ancillary claim as it expressly excludes proceedings relating to real property. This latter point was not raised before the Judge. However, since this is an issue of law for which no further evidence is required, we can treat with it on appeal: **Diamondtex Style Limited v National Union of Government and Federated Workers Civil Appeal 59 of 2008**.

8. We see no merit in this submission. By **section 2 (i)** the Act defines 'action' "as any civil proceedings in a Court of law other than those relating to real property." **Rule 18.2(1) of the Civil Proceedings Rules 1998** (the CPR)

provides that for the purpose of the Rules an ancillary claim is to be treated as a claim. For all intents and purposes therefore, although they may be heard together, an ancillary claim is to be treated as a separate claim. While the original claim relates to real property the claim between Onyx and the Respondents, brought as an ancillary claim, is a claim in negligence and contract. In these circumstances the claim does not relate to real property. The Act therefore applies to the claim between Onyx and the Respondents.

9. Onyx submits that the cause of action accrued at the time it discovered the fraud in 2015 or alternatively that damage has not yet accrued to it since the deed of conveyance is still in its name. The position posited by the Respondents is that the cause of action accrued on the date of the execution of the deed of conveyance, that is, on the 7 September 2009. They submit that at the time of the commencement of the ancillary claim, 25 May 2016, the claim was already statute-barred.

10. In support of its submission Onyx relies on the Privy Council decision in the case of **Maharaj and another v Johnson and others [2015] UKPC 28**. In accordance with the reasoning in that case it submits that the instant case is a "no transaction" case and relies on a statement by Lord Wilson in that case at **paragraph 19** that:

> "In the "no transaction" case the inquiry is whether, and if so at what point, the transaction into which the claimant entered caused his financial position to be measurably worse than if he had not entered into it."

11. In support of its position Onyx submits that (i) to date it has not actually suffered measurable harm as it still enjoys proper and legal title to the land until declared otherwise by the Court; (ii) it has been at all material times, save upon the filing of the claim by the Claimant, in undisturbed possession and control of the said lands; and (iii) until otherwise declared

it enjoys the benefit of a registered deed and so can still promulgate itself, even if artificially, as the paper title owner. This position, it submits, is supported by the case of **UBAF Ltd. v European American Banking Corp [1984] QB 713**.

12. The claim that it is a "no transaction" case follows nomenclature adopted in the **Maharaj** case. In that case the claimants sued the defendants, attorneys at law, in negligence. They contended that in 1986 the defendants failed to procure a good marketable title for them and, in particular, failed to advise them that the person who signed the deed transferring the property to them had no power to execute the deed on the owner's behalf. The damage alleged by them was the loss of a sale of the land for $20 million.

13. As in the appeal before us the issue for the court's determination was when did the claimants suffer damage as a result of the defendants' breach of duty. One of the questions to be determined was whether the case was a "no transaction" case or a "flawed transaction" case. Treating with the distinction between the two Lord Wilson, delivering the decision of the court, stated:

> "For in the latter the claimant *does enter* into a "flawed transaction" in circumstances in which, in the absence of the defendant's breach of duty, he would have entered into an analogous, but flawless, transaction. In the former, however, the claimant also enters into a transaction but in circumstances in which, in the absence of the defendant's breach of duty, he *would have entered* into "no transaction" at all. The difference in concept dictates a difference in the inquiry as to whether, and if so when, the claimant suffered actual or measurable damage. In the "flawed transaction" case the inquiry is whether the value to the claimant of the flawed transaction was measurably less than what would have been the value to him of the flawless transaction. In the "no transaction" case

> the inquiry is whether, and if so at what point, the transaction into which the claimant entered caused his financial position to be measurably worse than if he had not entered into it.": at **paragraph 19**.

14. On the particular facts of Maharaj the transaction was held to be a "flawed transaction". Both Onyx and the Respondents accept that on the facts of the appeal before us this is a "no transaction" case. Applying the reasoning of the court in Maharaj therefore the question to be answered is: whether and, if so at what point, the transaction into which Onyx entered caused its financial position to be measurably worse than if it had not entered into it. The answer to the second part of the question would be the date when the loss was suffered.

15. Onyx also relies on a statement of Lord Acker in **UBAF** in support of its submission that the fact of it entering into the contract does not inevitably mean that it suffered damage by merely entering into the contract. The claimant's case in UBAF was based on negligent but innocent misrepresentation. The issue of whether the claim was statute barred was raised on an application to set aside leave to serve the claim out of the jurisdiction. As in the instant appeal it was decided on a preliminary issue before the evidence was taken in the claim.

16. According to Lord Ackner dealing with the claimant's case:

> "Their case is that, if they had known the respects in which the representations were inaccurate, they would not have entered into the contract. Accordingly, it is argued by the defendants that, at the very moment of entering into that contract, the plaintiffs must have suffered damage. In our judgment, this bare proposition is not self-evident. The plaintiffs are suing in tort – the tort of negligence. To establish a cause of action they must establish not only a breach of duty, but that that breach of duty occasioned them damage. This is

axiomatic. It is possible, although it may be improbable, that, at the date when the plaintiffs advanced their money, the value of the chose in action which they then acquired was, in fact, not less than the sum which the plaintiffs lent, or indeed even exceeded it.": at **page 725**.

17. The position taken in **UBAF** relied on by Onyx has no application to the instant appeal. There the issue was whether the plaintiff had suffered any damage at all. To determine this evidence would have had to be led on the value of the chose in action acquired by them as a result of the misrepresentation. This was a question of evidence that could not be determined on a preliminary point. This is not the case in the appeal before us. In this appeal there is no question but that the Appellant's financial position was measurably worse. There is no need to receive evidence in this regard. Being a "no transaction" case at issue here is when did Onyx's financial position become measurably worse than if it had not entered into the transaction. The answer must be at the time that it entered into a transaction that gave them no title to the land. In other words when they paid the purchase price and executed the deed of conveyance.

18. As the Judge correctly determined if the Rampersadsinghs succeeded the deed would be void ab initio. The result being that Onyx would have paid the purchase price for the land and received nothing in return. This was at the time of the payment of the purchase price and the execution of the deed of conveyance on the 9 September 2009. This was the date when Onyx suffered loss and when the cause of action arose. The position here is similar to the position taken by Moosai J., as he then was, in the case of **Victor Mungal and others v Scotiatrust and Merchant Bank of Trinidad and Tobago Limited others CV 2006-03031.** We agree with this decision.

19. The fact that Onyx was still the paper title owner of the land is of no consequence as the deed of conveyance, being a forgery, could not transfer

any title to Onyx. Similarly the fact of Onyx's possession of the land up to the filing of the claim made no difference to the accrual of the cause of action. Onyx paid the sum of $3,300,000 not for mere temporary possession of the land but for the transfer to them of the freehold title. In these circumstances, unless the Appellants are correct that section 4(1) and not section 3(1) of the Act applies, then the cause of action accrued in September 2009 and the ancillary claim is statute-barred.

20. **Section 4(1) of the Act** states:

> "Where an action for damages is brought as result of a tort and a tortfeasor (in this section referred to as "the first tortfeasor") is entitled to recover a contribution in respect of the damages from another tortfeasor who is not a party to the action, no action to recover such contribution shall be brought by the first tortfeasor after a period of two years from the date on which the first tortfeasor is held liable for the damages by a judgment given in civil proceedings or an award made by an arbitrator."

21. The section applies to circumstances where there are joint tortfeasors and only one such tortfeasor has been sued. The section gives that tortfeasor two years from the date of any judgment against it to sue the other for a contribution with respect to the damages awarded. This is not the factual scenario in this case. Neither the claim nor the ancillary claim are proceedings which would entitle a joint tortfeasor to seek a contribution from another joint tortfeasor so as to postpone the limitation period. The Rampersadsinghs seek no relief in tort against the ancillary defendants. Nor is the ancillary claim a claim against a joint tortfeasor. Consequently there can be no postponement of the date of the accrual of the cause of action on the basis of a claim for a contribution from a tortfeasor who has not been sued. Section 4(1) of the Act therefore does not apply.

22. In these circumstances we are of the opinion that the Judge was correct when he determined that the ancillary claim was statute-barred and dismissed the ancillary claim against the Respondents. Accordingly the appeal is dismissed and the decision of the Judge affirmed.

Judith Jones
Justice of Appeal